No. 88-1545

Supreme Court, U.S.
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IN THE
United States Supreme Court
October Term, 1988

ALEKSANDRS V. LAURINS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRIAN W. SHAUGHNESSY
SHAUGHNESSY, BOROWSKI & GAGNER
1400 I Street, N.W.
Suite 320
Washington, D.C. 20005
(202) 371-2281

Attorneys for Petitioner

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QUESTIONS PRESENTED*

1. Whether there was sufficient evidence of petitioner's specific intent to commit the crimes of obstruction of justice and contempt of court in light of *Braswell v. United States*, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), which was decided after the trial and judgment in this case, but before the decision on appeal.

2. Whether a fine of $250,000 may be imposed pursuant to 18 U.S.C. §3571 for an offense that occurred before the effective date of that statute.

3. Whether the cumulative effect of the judicial misconduct enabled petitioner to receive a fair trial in this case.

4. Whether the destruction of evidence coupled with an erroneous instruction placing the burden for the loss of evidence on petitioner deprived him of a fair trial.

*The caption in this case contains the names of all parties.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner Aleksandrs V. Laurins, respectfully prays that a *writ of certiorari* be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 8, 1988.

OPINION BELOW

The opinion of the Court of Appeals was reported at 857 F.2d 529 (9th Cir. 1987). The District Court for the Northern District of California did not enter an opinion in this case.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered in this proceeding on September 8, 1988. The final judgment on petitioner's Petition for Rehearing and Rehearing *En Banc* in the United States Court of Appeals for the Ninth Circuit was entered on January 17, 1989, and this petition for a *writ of certiorari* was filed within the time prescribed by the rules. The Court's jurisdiction is invoked under 28 U.S.C. §2154(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

18 U.S.C. §401. Power of Court

> A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as — (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. §1505. Obstruction of proceedings before departments, agencies and committees

> Whoever corruptly, or by threats of force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence,

obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, . . .

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. §3571. Sentence of fine.

(b) Fines of individuals. — Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of —

(3) for a felony, not more than $250,000.

STATEMENT OF THE CASE

On September 8, 1988, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment and a timely Petition for Rehearing by the Panel and Suggestion for Rehearing *En Banc* was filed. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 17, 1989, and this Petition for a *Writ of Certiorari* was filed.

STATEMENT OF FACTS

On March 6, 1987, petitioner Aleksandrs Vilnis Laurins was charged in an indictment returned by the grand jury for the Northern District of California with one count of obstruction of justice by impeding the administration of the law (a proceeding before the Internal Revenue Service (hereinafter "IRS") by means of concealing from the IRS certain docu-

ments that were summoned from Gold Depository and Loan Corporation (hereinafter "GD&L") in violation of 18 U.S.C. §1505(1), and with one count of having aided and abetted contempt of court in violation of 18 U.S.C. §401(3), and 18 U.S.C. §2 involving disobedience of an order enforcing the summons issued to GD&L. Defendant was arrested on March 6, 1987, and has been incarcerated since that time. After a trial before District Judge Stanley Weigel, sitting with a jury, defendant was convicted on both counts on June 18, 1987. Consecutive sentences of five and three years on the obstruction and contempt counts, respectively, and a fine of $250,000 were imposed by the court on August 26, 1987.

On January 5, 1984, a summons to Gold Depository and Loan Corporation ("GD&L") for the production of a long list of GD&L records was served on an officer of GD&L. The IRS commenced proceedings in District Court to enforce the summons and on August 12, 1984, Charlene Baden, the president of GD&L, appeared before the IRS, but raised a Fifth Amendment privilege and produced no records responsive to the summons.[1] Thereafter, on October 22, 1984, District Judge Weigel entered an order enforcing the summons and directing GD&L to appoint an agent to testify without invoking personal privileges against self-incrimination and to furnish such information and documents as were available to the corporation. The agent, Mr. Arce, provided no documents, nor was he able to satisfactorily answer IRS Agent Tonna's questions.

[1]The corporate records of GD&L were in the Maryland office under the control of Charlene Baden. This was corroborated by the testimony of Michael McAllister. Records appearing to be those sought by the summons were located after petitioner's conviction. Had these been available to petitioner before or during trial he would have been able to defend against this indictment effectively, with a likely acquittal. These records form part of the basis for petitioner's Motion for a New Trial, which has been denied by Judge Weigel and is now on appeal to the Ninth Circuit.

Tonna testified, without basis and over objection, that GD&L had revenues of $15,000,000 as a result of the sale of cargo containers. The prosecutor put his unsubstantiated beliefs before the jury as to the nonexistence of the cargo containers and Agent Tonna testified that GD&L had not received enough lease income to justify a belief that containers had actually been sold. IRS Agent Billy Johnson then testified that there was a search of the petitioner's home at 3340 Clay Street in San Francisco during which records admitted as GEX 70 were seized.

Bart Lee, petitioner's former attorney, related over objection that he had discussed with petitioner Laurins on December 9, 1983, the likely consequences of the IRS's intentions with respect to GD&L, including the likelihood of petitioner's being summoned and being able to assert various privileges. Mr. Laurins explained during their discussion, that in October 1983 a new board of GD&L had been elected and that all GD&L loan accounts were being closed out and that all GD&L documents for the container business were to be sent to London. Lee was also told that Charlene Baden could testify as to the GD&L documents. Lee went on to say that a complaint had been prepared, but not filed, to attempt to force the United States to provide a judicial test of the summons.

Tracy Higginbotham testified that he had worked on cargo container projects for Metro Services Group; that he recognized some of the records in GEX 70; and that Laurins had given him an order to box up the records and these were taken out of the Union Street office by petitioner. Higginbotham said that there was no relationship between the records he had boxed and the records the IRS had asked for in the summons.

In his defense, Mr. Laurins explained that he had started GD&L in 1978 and had remained an officer and director until 1980, at which time he resigned from both positions. In 1982

when GD&L commenced the cargo container business, the president was Charlene Baden whose office was in Maryland. The cargo container sales were handled by GD&L, acting as a finder. The sales were then financed by Co-op Investment Bank (hereinafter "CIB"), after a down payment by the prospective purchaser. The containers themselves were not to be purchased by GD&L, but were to be handled by CIB. GD&L itself neither bought cargo containers nor was it required to do so. In October 1983, because there was concern about the change in attitudes towards tax shelters in the United States, it was decided that GD&L would get out of the cargo container brokerage business and sell its operation to Mortgage Guarantee Trust (hereinafter "MGT") with the intention that all of its cargo container records and accounts would be turned over to MGT.

In December 1983, when GD&L and Mr. Laurins became aware of the IRS's request for documents, the business had already been sold. The cleaning up of the transactions from 1983 was handled by Metro Group Services West (hereinafter "MGSW"), a service organization that did much of the paperwork for GD&L and other corporations. After MSGW had completed the processing of the paperwork for the cargo container program for 1983, the investment contracts and other relevant documents, which were then the property of CIB, which had financed the cargo transactions, were taken from the premises on Union Street by Mr. Laurins to his home. The 1982 cargo container records, also the property of CIB, had been stored at his Clay Street home during 1983, well before the IRS investigation had commenced.

Mr. Laurins felt it was necessary to do this because as counsel to CIB he had an obligation to preserve its records and to take them out of the place of business on Union Street so that CIB would not be regarded as doing business in the United

States. Mr. Laurins retained CIB records in his home on Clay Street during the course of the summons enforcement proceedings because he did not want to take the records out of the court's jurisdiction and be faced with a possible obstruction of justice allegation. The issuance of the IRS summons placed Mr. Laurins in a quandary, as counsel to CIB and a fiduciary.

Petitioner Laurins explained that he had discussed the November 1983 letter, GEX 1, with counsel and understood that it created no compulsion for anyone connected with GD&L or the corporation itself to produce records[2] for the IRS. Thereafter, he was told by his attorney, Mr. Lee, of the proper procedures for the IRS to employ in seeking documents, which included serving summonses and calling for people to testify. Petitioner was told by counsel that those called to testify had the option to exercise any privilege available to them, but, if immunity were granted to whoever had custody of the GD&L documents and that person continued to refuse to testify after being granted immunity, he or she would be held in contempt and perhaps charged with a criminal offense. Mr. Laurins had, in the past, litigated with the United States government fully and had complied with any order of any judge who had directed him to do something. No summons or order, however, had been directed at petitioner in this matter.

Petitioner testified that GEX 70 was comprised in part of the 1982 records of CIB and that in late January or the middle of February of 1984, he took the records from his house to 2124 Union Street so that employees of MSGW could prepare client statements for 1983. Petitioner further testified that

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[2]Mr. Arce's attempts to locate the records and any directions given him were not developed in the government's case, except for a few hearsay remarks by Agent Tonna. We assume Mr. Arce was available to the government as a witness.

GEX 70 contained boxes labeled 1983, which were the so-called "customer files" for 1983 clients, and that, as corroborated by government witness Higgenbotham, most of these records (80-90%) did not exist at the time of the summons. The other 10-20 percent belonging to MSGW and CIB were located at 2124 Union Street some time after January 5, 1984.

The bulk of the documents in GEX 70 were not GD&L records because they were never in the custody of GD&L and they were never prepared or stored by GD&L employees. They were, in fact, the central files that supported the loans prepared or made by CIB with regard to the cargo container program. Viewing them as records of CIB, petitioner, as counsel for the bank, understood that the procedure for obtaining the records was for the IRS to issue a summons under Section 7609 or a summons to him personally under Section 7602, so that he could exercise his fiduciary obligation to customers of the bank to preserve their confidence and his own Fifth Amendment privilege with respect to production of the records, if he believed the act of production would incriminate him.

Petitioner's view of his obligation under the law was supported by defense expert Montie Day, Esquire, a former Special Assistant U.S. Attorney for tax summons enforcement, who testified that the appropriate procedure was for the IRS to issue a summons to the custodian of records in person. Mr. Day further testified that, so long as the custodian of the records did not remove the documents from the jurisdiction of the court and held them available for summons, such behavior would be consistent with the behavior of a responsible custodian. A responsible third party custodian must return records to his client if requested and would have an affirmative duty not to turn over the records if doing so would vitiate his clients' right to litigate the propriety of a summons.

Petitioner testified that in January 1984, he knew he had an obligation, whether as a third part record-keeper or as a custodian under §7602, to maintain the records to make sure that they were not destroyed; he knew he would have to hand the records over to CIB if the bank asked for the records, but that he did not have a responsibility for handing over the records to GD&L because they were not GD&L records; and he knew he would have to turn the records over, irrespective of whose properties they were, if ordered to do so by court. Petitioner testified that he had no contact with the agent, who was appointed pursuant to the District Court's order.

After the sale of the container business by GD&L in 1983, petitioner ceased even being counsel for GD&L, and simply acted as a conduit for information to Charlene Baden, who was the president of GD&L, although he continued as counsel in one piece of litigation with which he had been involved since its inception. He testified that tax returns and other documents had been signed on behalf of GD&L since 1980 by Charlene Baden.

Petitioner testified that he believed that a purchase agreement evidencing the purchase by MGT from GD&L of the cargo container business was in the records seized by the government.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. There Was Insufficient Evidence that Petitioner Acted With the Intent to Obstruct Justice and to Commit Contempt of Court.

An essential element of criminal contempt is willful disobedience or resistance to a court order. At the summons compliance hearing, the president of GD&L invoked the Fifth Amendment. This she could not have done unless the documents requested were in her actual possession.[3] If, as the government contended at trial, petitioner had the corporate files at the time the court order was issued, GD&L, as a principal, could not have complied with the order. If it could not comply, then it could not have been convicted. *United States v. Patterson*, 219 F.2d 659 (2d Cir. 1955) (no conviction for failing to produce the sought-after books when they are not shown to be presently within defendant's power and control).

The government cannot save this count of the indictment by showing that petitioner was, in fact, identical with GD&L, since a person cannot aid and abet himself in the commission of a crime. *United States v. Wiley*, 492 F.2d 492 (D.C. Cir. 1973). There was no evidence showing that Baden's assertion of the Fifth Amendment constituted wilfulness as required for contempt by the corporation. Thus, there was simply no evidence at trial on the issue of wilfulness of any principal.[4]

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[3] *Couch v. United States*, 409 U.S. 322 (1984), quoted in *In re Grand Jury Proceedings United States*, 626 F.2d 1051 (1st Cir. 1980) (inability to comply with the court order is a defense to criminal contempt). *United States v. Asay*, 614 F.2d 655 (9th Cir. 1980).

[4] *Compare United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), in which a defendant was charged with obstruction for having furnished falsified documents to the grand jury. There the government claimed that the defen-

Therefore, it follows that this element has not been proved beyond a reasonable doubt. Since the guilt of the principal has not been proven, the conviction of petitioner for aiding and abetting cannot stand.

Not only was there insufficient evidence of criminal acts by a principal, but there was no evidence presented that petitioner in any way aided and abetted GD&L. Indeed, the evidence was to the contrary—that by the time of the court order, petitioner had disassociated himself entirely from GD&L and had informed his attorney that he did not speak for GD&L, and that Charlene Baden was in charge of the company. Nor was there evidence presented that petitioner controlled Baden.

The government did not identify any act of petitioner, subsequent to the court order, which assisted GD&L in any way in a criminal contempt. At most, he remained silent, not approached by any agent of GD&L or the government, retaining documents which the government would have liked to have had. To assert that he had a duty to volunteer that he possessed these documents would be to abrogate entirely petitioner's Fifth Amendment right to remain silent.

Similarly, to convict of obstruction of justice, it was required that the government prove petitioner corruptly influenced or endeavored to influence, obstruct or impede the due administration of justice of an agency proceeding, 18 U.S.C. §1505. The Court of Appeals, in dealing with the specific intent required for obstruction of justice, determined that there was some concealment of GD&L files after the summons was issued, with the permissible inference that petitioner's intent

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dant should have resisted the production of the subpoenaed documents on Fifth Amendment grounds and by not doing so demonstrated the corrupt intent necessary for the conviction. By not volunteering at all, petitioner here did what the government had recommended in *Moon*.

was to frustrate the enforcement of the IRS summons. However, it appears that the court equated not volunteering to produce the documents with concealing the documents.

As a former IRS attorney and one familiar with IRS proceedings, petitioner reasonably anticipated that the government would follow the summons process. In anticipation of that, petitioner retained the records within the jurisdiction and did not destroy them, but maintained them in such a way that they would be available upon any proper demand. Although the government and the trial judge have suggested that petitioner should have volunteered the records, such a voluntary production is not a requirement of the agency proceeding nor has the government pointed to any such requirement. *Compare Blackmer v. United States*, 284 U.S. 421, 438 (1932) (duty to testify when properly summonsed). Accordingly, petitioner had a reasonable belief as to the legality of his actions and the government introduced no evidence to the contrary. Either the government sought to deprive petitioner of his Fifth Amendment privilege under *United States v. Doe*, 465 U.S. 605 (1984) and *Fisher v. United States*, 425 U.S. 391 (1976) or it has failed to provide adequate notice of what is regarded as criminal behavior.

There is a long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity. *Dunn v. United States*, 442 U.S. 100, 112 (1979); *Huddleston v. United States*, 415 U.S. 808, 812 (1971). Courts usually decline to impose punishment for actions that are not plainly and unmistakably proscribed, *United States v. Gradwell, 243 U.S. 7, 476, 485 (1917). See also United States v. So*, 755 F.2d 1350 (9th Cir. 1985), and *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984).

Specific intent may be demonstrated by an individual's deviation from what is clearly required of him. *United States v. Browning*, 630 F.2d 694 (8th Cir. 1980); *cf., United States v. Pomponio*, 429 U.S. 10 (1976). The government demonstrated no clear requirement that petitioner voluntarily produce the documents and the only expert in this matter testified that petitioner's obligation was to the contrary. Because there was no act of petitioner's, aside from volunteering the documents, that would have satisfied the government—yet, such volunteering was not called for by the procedure employed by the Internal Revenue Service in their attempt to get GD&L records — petitioner cannot be found to have had the specific intent to obstruct the proceedings.

Pointing to *Braswell v. United States*, ____ U.S. ____, 108 S.Ct 2284, 101 L.Ed.2d 98 (1988), decided on June 22, 1988, after briefing and argument in this case, the Court of Appeals stated that petitioner's motive to wait until he was personally summoned does not negate evidence of a corrupt motive, even though petitioner may have been operating under a good faith belief that the IRS was required to serve him and that he would have an opportunity to assert the "act of production" privilege that the corporate attorney had assured him was available to him under *United States v. Doe*, 465 U.S. 605 (1984).

However, *Braswell* changed the law or at least the widely held belief as to its requirements. Invoking the collective entity doctrine, a five-to-four majority of the Supreme Court resolved the conflict that had arisen from the Court's opinions in *Fisher v. United States*, 425 U.S. 391 (1976) and *United States v. Doe*, 465 U.S. 605 (1984), by holding that a custodian may not resist a subpoena on the ground that his act of production would be self-incriminating. The majority indicated that the custodian's act of production is not deemed a personal act, but rather an "act of the corporation."

As Justice Kennedy in dissent perceptively noted:

> The Court today denies an individual his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself. To reach this ironic conclusion, the majority must blur an analytic clarity in Fifth Amendment doctrine that has taken almost a century to emerge. After holding that corporate employment strips the individual of his privilege, the Court then attempts to restore some measure of protection by its judicial creation of a new zone of immunity in some vaguely defined circumstances. This exercise admits what the Court denied in the first place, namely that compelled compliance with the subpoena implicates the Fifth Amendment self-incrimination privilege. 101 L.Ed.2d at 115-116.

Whether *Braswell* represents new law or a "finding" of an unbroken line of precedents from *Hale v. Henckel*, 201 U.S. 43 (1906) to the present, there is no question that *United States v. Doe*, 465 U.S. 605 (1984), was commonly perceived as permitting a custodian to assert an act of production self-incrimination privilege. In fact, petitioner was so advised by the government's witness, petitioner's previous counsel, Bart Lee. This change in the law since petitioner's action constitutes an *ex post facto* revision of his obligations to respond to a summons. When coupled with his well-supported belief that he should have been served under 26 U.S.C. §7602, a claim noted, but not addressed by the appellate court, there is ample support, in the utter absence of contrary evidence, for the proposition that the proof of specific intent in the government's case was insufficient.

The issue of specific intent, in addition to being a matter of law not fully addressed in the opinion, raises a question of

exceptional importance when examined in the context of the obligations of a *de facto* officer or controlling person, as the court suggested petitioner could have been found by the jury. Assuming that in retrospect it can validly be inferred, viewed in the light most favorable to the government, that petitioner was a *de facto* officer or director of GD&L, a particularly vexing problem is raised: when a person without a legal connection to a corporation is in possession of documents and the corporation is served with an agency summons, rather than a grand jury subpoena, does that person have an obligation to volunteer or come forward to inform the agency that he is in possession of records? If he is obligated, what, if any, privileges or rights may he assert and how?

In a case relied upon by the appellate court, cited by petitioner but not cited by the government in support of its position, *United States v. Seetapun*, 750 F.2d 601 (7th Cir. 1984), it was noted that an appearance before the trial court was required before contempt sanctions could be imposed on an individual who possessed records summonsed from a corporation. Since the ostensible *de facto* officer in *Seetapun* had never been brought before the court, the case was remanded for a contempt hearing.[5]

In the instant case, petitioner was never afforded the due process hearing required by *Seetapun* nor was an order ever directed against him to produce, although Special Agent Tonna testified he believed for years that petitioner ran GD&L.

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[5]There has been no similar obstruction case under Section 1505 found where an individual who was not summoned in the agency proceeding was convicted. Although there can be a conviction for concealing subpoenaed documents under §1503 where a self-executing grand jury subpoena was issued, *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1981), no similar case has been found under 18 U.S.C. §1505 for an administrative summons.

To support the imposition of criminal sanctions for contempt, where there had been no specific order determining petitioner's relation to the corporation as required in *Seetapun*, the Court of Appeals relied on *NLRB v. Sequoia District Counsel of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977) and *NRLB v. Maine Caterers Inc.*, 732 F.2d 689, 591 (1st Cir. 1984), both civil injunction cases, as supportive of the notion that a technical non-party to the litigation may be bound by an order. However, in those cases, the opportunity to comply was afforded the prospective contemnors. Petitioner received no such notice of an opportunity to comply.

The ultimate result of the approval of the government's procedure in this case (which violates the IRS procedures by which most tax practitioners expect the IRS to be guided) is to give the IRS immediate use of the criminal process to intimidate persons who might be inclined to contest an agency summons in a civil enforcement provision. This may be accomplished by the IRS's bringing a civil enforcement proceeding against a party without affording the IRS's true target an opportunity to participate and then proceeding directly against the non-party target by criminal action. By that device the government obtained its convictions here without having to prove petitioner's specific intent as to both offenses.

II. Judicial Misconduct Deprived Petitioner of a Fair Trial.

A federal trial judge is not a mere moderator or umpire of a trial, but its governor.[6] However, a judge must not "abandon his proper role and assume that of an advocate." *United States v. Green*, 544 F.2d 138, 147 (3d Cir. 1976). "The Judge's participation must never reach the point where 'it appears clear to the jury that the court believes that accused is guilty.'" *United States v. Nobel*, 696 F.2d 231, 237 (3rd Cir. 1982). If it intervenes, the trial court must be mindful of the sensitive role it plays in a jury trial and avoid using the appearance of advocacy or partiality, *United States v. Malcolm*, 475 F.2d 420 (9th Cir. 1973). "When the participation of the trial judge is designed to elicit answers favorable to the government, 'it is far better for the trial judge to err on the side of abstention from intervention.'" *United States v. Harris*, 501 F.2d 1, 11 (9th Cir. 1974), quoting *Blumberg v. United States*, 222 F.2d 496, 501 (5th Cir. 1955); *accord*, *United States v. Green*, 429 F.2d 754 (D.C. Cir. 1970). A review of even the salient points demonstrates that the trial judge's conduct went so far beyond the pale that petitioner was wrongfully denied his due process rights.

The trial court's intrusions were precisely the types of disruption for which reversal was granted in *United States v. Harris*, 501 F.2d 1, 10-11, N. 14-17 and 20 (9th Cir. 1974). For example:

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[6]*Smith v. United States*, 305 F.2d 197, 2056 (9th Cir. 1962)and *Quercia v. United States*, 289 U.S. 466 (1933). *See Quercia v. United States*, at 470: "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judical office. . . . The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference and may prove controlling.'"

1) The trial court wrested the cross-examination of Bart Lee away from defense counsel and entirely turned the questioning around to what Lee had advised petitioner about the object of the IRS summons.

2) When defense counsel was attempting to show that Ms. Baden rather than petitioner exerted control over GD&L — a critical issue at trial—through her position as acting President of GD&L, the court took over cross-examination to show that she had less than full authority, which was consistent with the judge's position that petitioner controlled GD&L.

3) When defense counsel attempted, on cross-examination, to show that the prosecutor had told Bart Lee that GEX 70 was comprised of GD&L documents — one of the central issues in the case — the judge completely disrupted defense counsel and suggested the contrary to the jury.[7]

The judge's intrusions were exacerbated by the improper conduct of the prosecutor, which was instigated and encouraged by the trial court. During argument before the jury, the prosecutor was permitted to interject his personal beliefs.[8] For

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[7]The court: "I didn't see much reason for going into this,' and interrogated defense counsel, in front of the jury as was his practice, "Do you [defense counsel] question whether or not the majority of records over there, which have been referred to as plaintiff's 70 are Gold Depository and Loan records?" Counsel replied, "I don't want to say what my belief is because I don't really know, I was not there." Judge Weigel, "Counsel, here is my feeling, if you don't want, on behalf of your client, if you don't want to go along, that's perfectly alright." What probative worth counsel's opinion as to an essential fact may have had is difficult to perceive. Nonetheless, the jurors had to conclude that the judge had already decided that the majority of the records in GEX 70 were GD&L records and that defense counsel was just wasting everyone's time.

[8]For example, during an argument over whether certain written evidence should be admitted, the prosecutor stated before the jury, "It's the basis for him [Tonna] sending a letter to [petitioner] on May 29, 1985, concluding that [petitioner] had a controlling or something to do with Gold

example, the prosecutor stated, "I think it is important for the jury to determine how this case came about. That it wasn't a whim. Based on substantial evidence, we believed." This suggested that petitioner was guilty because he was indicted, and violated the standards of *United States v. Bess*, 593 F.2d 749 (6th Cir. 1979), and *United States v. Splain*, 545 F.2d 1131 (8th Cir. 1976), and is grounds for reversal in itself.

Defense counsel objected to the judge's questions several times and at other times he did not. As the Seventh Circuit emphasized in *United States v. Hill*, 332 F.2d 105, 106 (7th Cir. 1964), quoted with approval in *United States v. Hickman*, 592 F.2d 931, 936 (6th Cir. 1979):

> Counsel for defendant in a criminal case is indeed in a difficult and hazardous predicament in finding it necessary to make frequent objections in the presence of a jury to questions propounded by the trial judge. The jury is almost certain to get the idea that the judge is on the side of the Government.

In this manner, the judge "abandoned his proper role" and "reached the point where 'it appear[ed] clear to the jury that the court believed the accused is guilty.'" *United States v. Beaty*, 722 F.2d 1090, 1093 (3d Cir. 1983), quoting, *United States v. Green*, at 138, 147 *cert. denied* 430 U.S. 910 (1977) and *United States v. Nobel, supra*, quoting *United States v. Robinson*, 635 F.2d 2, 9 (2d Cir. 1980).

Over objection, the prosecutor put in evidence of petitioner's prior conduct, including the purported nonexistence of the cargo containers, and the reasons the court lifted petitioner's

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Depository and Loan." The prosecutor thereby told the jury that the government had evidence, which would demonstrate that petitioner, not Baden was in control, even though that evidence was not admissible. When the prosecutor had finished his argument on the law before the jury, there was no need to have the writing admitted and it was not.

attorney-client privilege with his former lawyer and the alleged fraud against taxpayers. The admission of such evidence violated FRE 401 and 404. The injection of the issues of the existence of cargo containers and the alleged fraud against taxpayers, according to the prosecutors, was to show the IRS agent's motivation[9] for beginning the investigation into GD&L. The introduction of the motive for an agent's initiating an investigation is, of course, prejudicial in itself and had no legitimate purpose at trial. *See United States v. Escobar*, 674 F.2d 469 (5th Cir. 1982).

In a clear effort to punish the defense atttorney for objecting to the introduction of testimony from petitioner's former attorney, the court asked the prosecutor before the jury the basis for lifting the privilege. The prosecutor replied that:

> The government's alleges [sic] that Mr. Laurins, the defendant, had used Mr. Lee and his legal representation to perpetrate a fraud on the court.

Following that answer, defense counsel again objected. The court then withdrew its own question and instructed the jury to disregard it and the answer given by the prosecutor. The court then admitted the testimony based on the prosecutor's response. It is difficult to believe that the judge intended the jury to take the instruction seriously, particularly when it was followed by the court's statement to defense counsel:

> It would be fair to say, Mr. Shaughnessy, that *you invited this* by your objection. You were certainly familiar with my prior ruling. [Emphasis supplied.]

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[9]The test for relevance is whether a fact makes more probable some fact of consequence: the motive of the agent for investigating petitioner is not relevant. While jurors may have been curious as to why the inspectors began their operation, enlightenment on this matter had no probative value. *United States v. Lamberty*, 778 F.2d 59, 61 (1st Cir. 1985).

Thus, it is clear that the prosecutor, with the help of the judge, sought to prejudice petitioner by putting these matters before the jury.[10]

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When these disruptions of, not "assistance" to defense counsel are cumulated as suggested in *Harris* with, among other intrusions, the judge's asking the prosecutor to express his belief before the jury that petitioner's guilt had been established and then, in clear reliance on the prosecutor's opinion, admitted the proffered evidence;[11] his instigating

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[10]Throughout the course of the trial, the prosecutor attempted to establish the alleged non-existence of cargo containers bought by GD&L. However, the existence or absence of these containers was not an issue in this trial for obstruction of justice and aiding and abetting contempt of court. *See United States v. Meeker*, 558 F.2d 387 (7th Cir. 1977), reversing a conviction for failure to report income, where prosecutor's questions, unsupported by evidence and suggesting prior misconduct, required reversal on constitutional grounds. In fact, both the prosecution and the judge stated early in the case that the issue of the existence of the containers was not germane to this case.

[11]For example:

> The Court: Have you established that the defendant in any way obstructed justice or failed to comply with court orders?
>
> Mr. Weill: Yes.
>
> Mr. Shaughnessy: Your Honor, I must object. I know it is your Honor's question. He is now permitted to state his conclusion on the ultimate facts before the jury.

The entire colloquy was held in the presence of the jury. The court gave no curative instruction following the exchange. When describing two lawsuits to enforce the summons (the first of which would have had GD&L as a plaintiff to test the service of the summons, but never was filed; the second brought by the IRS against GD&L), the court emphasized that only in the second did the plaintiff (this time the United States) actually desire that the summons be enforced. The court reviewed the evidence for the jury and directed a comment ostensibly at the prosecutor, "That's quite a difference, Mr. Weill." There was no justification for this intrusion, as the decision by GD&L not to file suit was hardly relevant to this case and, were it arguably so, the prosecutor was capable of explaining the testimony to the jury without support from the judge. *Compare Jackson v. United States*, 329 F.2d 893, 894 (D.C. Cir. 1964) (judge should advise what he wants done at bench or in chambers).

prosecutor to explain before the jury that the court had previously ruled that petitioner had used Lee to perpetrate a fraud on the court — that is, had deceived the court about the contempt and obstruction — and his explaining that defense counsel had somehow "invited" this expression of the prosecutor's opinion of guilt before the jury. The totality of the incidents, along with multitudinous prejudicial comments[12] and instructions, constitute precisely the type of behavior found to require reversal in *United States v. Harris, supra,* with which the instant case is in conflict.

The constant intrusion of the judge and his repeated suggestions to the jury that critical issues were already established adversely to petitioner were the bases for petitioner's claim that by failing to hold *any* bench conferences and requiring presentation before the jury of all legal arguments over the

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[12]In taking over the Lee cross-examination the Court asked, "Wait a minute. I am not done. Did he tell you, 'Let's do anything we can to give the full facts to the IRS?'" Lee answered, "No, sir."

Court asked Lee to please cooperate then: "All I am asking you to do is tell the truth and not be afraid to answer the questions. You understand that?" Lee: "I do." Court: "Nothing but the truth." Lee: "I understand." Court: "Don't be afraid."

Court: "I don't know. I would like the jury to get the facts. I am going to ask a few questions in that interest. Mr. Lee, Exhibit 15 was an order of the court in effect sustaining the propriety of service and ordering compliance with the summons; is that not correct?" Lee: "Yes." Court: "Now after that order was made, what if anything did you say to Mr. Laurins or did Mr. Laurins say to you concerning it." Lee: "I don't remember, but I probably kept Laurins informed." Court: ". . . you were the attorney at that time, weren't you?" Lee: "I was." Court: "This was important to you and your client, wasn't it?" Lee: "It was." Court: "You want the jury to believe, do you, that you have no recollection even as to the substance? It's not talking about detail. You have no recollection as to the substance of what you said to Mr. Laurins, your client, in this matter or what he said to you in regard to this ruling of the Court. Is that your testimony. You may object to that." Mr. Shaughnessy: "I do object." Court: "Withdraw the question."

admissibility of evidence, expressions of guilt, and other matters normally discussed outside the presence of the jury, the court abused its discretion. The Court of Appeals suggested that *United States v. Wellington*, 754 F.2d 1457 (9th Cir. 1985), might support the notion that the trial court's failure, despite the clear direction of FRE 103(c) to hold side bar conferences in this case was not error. However, *Wellington* is in conflict with the instant case since in *Wellington, at least one hundred and seventeen side bar discussions* were held. 754 F.2d at 1469. In petitioner's trial, *none* were held. The trial court's practice of deliberately putting impermissible matters before the jury and instructing the jury to ignore it was clearly revealed by his rejoinder that defense counsel had "invited" jury pollution merely by objecting to the admissibility of evidence.[13]

As another court has said, "One cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 885, 886 (5th Cir. 1962). For recent studies demonstrating the inefficacy of "curative" jury instructions, *see* Kelvin and Zeisel, *The American Jury*, 160 (1966); Lempert and Saltzburg, *A Modern Approach to Evidence*, 220 n.54 (1982); and Jonathan D. Casper, *Jury Study*, Northwestern University Center for Urban Affairs and Policy Research (1988). Here the jury box was permeated with the odor of

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[13]See Fed.R.Evid. 103(c), "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." FRE 103(c) proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. *United States v. Nace*, 561 F.2d 763 (9th Cir. 1977). This has a parallel in Rule 43(c) of the Federal Rules of Civil Procedure. The trial court's actions make it clear he wanted to alert the jury to any incriminating evidence, whether admissible or not.

the trial judge's conviction about petitioner's guilt. Because he was deprived of a fair trial, petitioner's conviction should be reversed.

III. The Government Failed to Preserve Material Stored on a Computer Seized and Ultimately Destroyed by the Government.

Whether charges against petitioner should be dismissed as a result of the government's failure to preserve key evidence depends upon a balancing of "the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice." *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) *(en banc), cert. denied*, 445 U.S. 917 (1980).[14] Since the Court must consider "legal concepts in the mix of fact and law" and "exercise judgment about the values that animate legal principles," the question is subject to *de novo* review. *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) *(en banc), cert. denied*, 469 U.S. 824 (1984).

As was held in *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974), a conviction should be reversed if the defendant can show "(1) bad faith or connivance on the part of the Government or (2) that he was prejudiced by the loss of evidence." *Id.* at 902. The exact content of the material destroyed need not be demonstrated.[15]

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[14]The balancing test in *Loud Hawk* puts too great a burden on the defendant. As stated by Judge Hufstedler in dissent, "The majority opinion has inexplicably required the defendants to come up with proof that the Government itself has destroyed." *Id.* at 1157. In formulating any balancing test, the Court must weigh conflicting interests. Here, the interests do not logically conflict, since the government's interest in obtaining a conviction is consistent with defendant's right to a fair trial

[15]"Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be

The essential facts of the destruction of the evidence are not in dispute, although the government did not concede at trial that the computer disk contained the information that petitioner claimed.[16] The computer, which was broken and retained by the government until a few days before trial, contained business records of MGT, which had purchased GD&L's container business before the IRS issued the summons in this case. The accounting records on the computer would have corroborated petitioner's testimony that the records seized by the government at his home were not the business records of GD&L.

At the end of the first day of trial the defense again requested a hearing on the return of the disks. The Court commented:

> Before the trial is over, I will see to it that you have the appropriate opportunity to go into that, assuming you still want to.
>
> [Defense counsel]: Even more so with this witness's testimony, it is absolutely essential now. We have opened up the entire cargo container business.
>
> [Court]: Just a moment. Would you read what I said as to those records? I wonder if you understand English.

The government knew, well in advance of trial, that the information stored on the computer had been destroyed. How-

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an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal," *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971); and *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971).

[16]The government agent, who used the computer while it was operable, falsely claimed that he made no written records from either computer seized. He later admitted making lists of files over a period of approximately six hours when confronted with them in his own handwriting. He further admitted that there was accounting information on the machine that was destroyed, which corroborated petitioner's earlier testimony to that effect.

ever, it made no mention of this fact to the defense until argument over a defense motion for access to the records about a week before trial.[17] At trial, the government said it did not know how it had broken the disk:

> Mr. Weill: We admit that when we brought it to the seventh floor it was working, and that when we moved it from the seventh to the eleventh, permanent storage area, it stopped functioning. We don't know why. It was under our supervision.

A disk, which the government stated was the missing and/or destroyed, was returned to the defense during the first day of trial, after several denials by the government that it ever existed. At the time the disk was delivered to defense counsel, FBI Agent McPherson shook the disk drive next to his ear "to see whether it would rattle," despite the clear warning labels on the drive that it is fragile, delicate equipment to be handled with care.

Defense counsel requested the sanction of dismissal for this government destruction of exculpatory evidence. The court said it would hold an evidentiary hearing on the issue of the government's destruction of the computer, but it later determined to give an instruction to the jury relating to the computer destruction instead. As proposed by petitioner, the instruction would have informed the jury that the evidence destroyed by the government might have been favorable to petitioner.

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[17] *See Loud Hawk, supra,* at 116a, where Judge Ely (dissenting) criticized the government for not notifying the defendant in that case that the dynamite involved was about to be destroyed. In the instant case, after the government had determined it could not repair the computer, the defense should have been notified so that it would have a fair chance to analyze the damage and possibly repair it. There are computer enhancement techniques that very likely could have retrieved the data had the government promptly contacted petitioner's counsel.

As actually read by the court, the instruction stated that:

> . . . computer equipment was lost or destroyed while in the exclusive control of the government. . . . If the *defendant* has failed to produce such evidence or offered a reasonable explanation for his failure to produce it, you may infer, but you don't have to infer, you are not bound to infer, that the evidence would have been favorable to the defendant.

This is not the instruction requested, and is a plainly incorrect statement of law.

The destruction of evidence issue was aggravated by the prosecutor who, during his closing argument, used the fact that no evidence had been produced by petitioner that the business had been sold and containers were purchased.

Relying on petitioner's failure to produce a contract or bill of sale for the sale of GD&L before the issuance of the summons, the Court found that petitioner had not established that the destroyed disk contained exculpatory evidence, despite petitioner's testimony, partially corroborated by FBI Agent Gunn, that the destroyed computer contained evidence of the 1983 sale of GD&L. Thus, the lack of evidence available to petitioner was used to justify a finding that the government's destruction of evidence could not have prejudiced petitioner. Whatever the merit of that logic, the Court of Appeals omitted to calculate the cumulative effect of the trial court's improper instruction, which placed the burden on petitioner for failing to produce the destroyed computer equipment. This issue was not addressed by the Appeals Court and appears to be a clearly erroneous instruction, which must have misled the jury.[18]

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[18]It was a significant part of petitioner's defense that GEX 70 was not composed of GD&L documents in existence prior to the summons. The Court of Appeals, in its opinion, concluded, "That some of the files belong-

IV. The $250,000 Fine Was Improperly Imposed.

The fine imposed exceeds the sanctions available for petitioner's conviction under 18 U.S.C. §1505, whose maximum permissible fine is $5,000. The sentence imposed here for obstruction was five years incarceration and a fine in the amount of $250,000.[19] Although the judgment and commitment

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[18]It was a significant part of petitioner's defense that GEX 70 was not composed of GD&L documents in existence prior to the summons. The Court of Appeals, in its opinion, concluded, "That some of the files belonged to other corporations or were created after the summons issued is not determinative, because there was competent evidence that significant amounts of material were GD&L records predating the summons."

The summons, which is the only possible notice of what the IRS wanted — and, thus, the only index to what petitioner could be said to have been knowingly obstructive and contumacious of — was issued on January 4, 1984, and served on January 5, 1984. The only government witness testifying to the content and time of existence of the documents was Higginbotham who said that he had only looked at a few of the records in GEX 70, and had prepared some of the records from January 1984 through April or May 1984. A reasonable juror could not have concluded beyond a reasonable doubt that the records in GEX 70 or any "significant amount thereof" were GD&L records predating the summons, because Higginbotham worked at most four days prior to the summons in January, and could not even state that unequivocally. No other witnesses who referred to the documents ever testified when the documents in GEX 70 came into existence, including the IRS agent, who opined that the records were investor files and that many were signed by Laurins, or Lee, who had no independent knowlege but merely parrotted what the prosecutor had told him.

It appears that although there has been much general talk, leading questions and hearsay proffered, the only specific, concrete testimony concerning the records came from Higginbotham, who did not start work until January 1984, and who *could not identify even one document* created prior to January 5, 1984. Accordingly, far from there being substantial material in existence at the time of the summons, the government has adduced absolutely no testimony that *any* material, much less *substantial* material, was in existence at that time.

[19]Of over eight hundred cases reviewed, none has been found in which consecutive sentences of this magnitude have been imposed for obstruction and contempt.

order does not specify the statutory authority for the $250,000 fine, it cannot be found in 18 U.S.C. §1505. It is possible that the trial court was looking to the alternative fines provision of 18 U.S.C. §3571(a)(3), which permits a $250,000 fine for a felony conviction. However, 18 U.S.C. §3571 applies only to offenses committed *after* December 31, 1984. Since petitioner's offense occurred on or about July 12, 1984, the fine was improper, *Toussie v. United States*, 397 U.S. 112 (1970), and should be remitted to the statutory maximum of $5,000 set forth in 18 U.S.C. §1505.

CONCLUSION

For the foregoing reasons, petitioner submits that his Petition for a *Writ of Certiorari* should be granted and his conviction reversed.

Respectfully submitted,

BRIAN W. SHAUGHNESSY
SHAUGHNESSY, BOROWSKI & GAGNER
1400 I Street, N.W.
Suite 320
Washington, D.C. 20005
(202) 371-2281

Attorneys for Petitioner

March 17, 1989

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been mailed, postage prepaid, this 17th day of March 1989 to Assistant United States Attorney Jay Weill, United States Attorney's Office, 450 Golden Gate Avenue, San Francisco, California 94102 and the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

/s/

Brian W. Shaughnessy

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
JAN 17 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	No. 87-1251
Plaintiff-Appellee,	DC No. CR-87-0170-SAW
v.	
ALEKSANDRS V. LAURINS,	ORDER
Defendant-Appellant.	

Before: BOOCHEVER and NORRIS, Circuit Judges, and STEPHENS*, District Judge.

The panel has voted to deny the petition for rehearing. Judge Norris rejects the suggestion for rehearing en banc and Judges Boochever and Stephens so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ALEKSANDRS V. LAURINS, *Defendant-Appellant.*	No. 87-1251 D.C. No. CR-87-0170-SAW OPINION

Appeal from the United States District Court
for the Northern District of California
Stanley A. Weigel, District Judge, Presiding

Argued and Submitted
April 14, 1988—San Francisco, California

Filed September 8, 1988

Before: Robert Boochever and William A. Norris*, Circuit Judges, and Albert Lee Stephens, Jr.**, District Judge.

Opinion by Judge Boochever

SUMMARY

Criminal Law

The court affirmed a judgment of conviction of obstruction of justice and aiding, abetting, and causing contempt of court.

*Judge Norris was drawn to replace Judge Anderson.

**Honorable Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

Appellant Aleksandrs Laurins appeals his conviction of obstruction of justice and aiding, abetting, and causing contempt of court, in connection with an IRS investigation of Gold Depository and Loan Company, Inc. He contends there was insufficient evidence to support his conviction, that he was denied a fair trial by judicial and prosecutorial misconduct, that evidence and testimony at trial were improperly admitted, and that the district court erred in imposing consecutive sentences.

[1] Willfulness is an essential element of criminal contempt. Although willfulness is not *required* for a finding of civil contempt, civil contempt may be based on willful behavior. [2] If GDL complied with the order enforcing the summons, the fine would be waived. This penalty was intended to coerce GDL to comply and was therefore a civil contempt order. [3] A nonparty may be held liable for contempt if he or she either abets or is legally identified with the named defendant. [4] There was ample evidence that Laurins continued to exercise at least de facto control over the company after the summons issued. [5] Further, his concealment of the records in his home constitutes abetting GDL's failure to comply. [6] 18 U.S.C. § 1503 is the statute proscribing obstruction of justice in a judicial proceeding. [7] The IRS agent investigating GDL testified that the records found in Laurins' home were those requested in the summons and consisted of investor files. [8] Laurins further claims that the great majority of the customer files in the twenty-one boxes of business records consisted of material not in existence when the summons was issued, and that the remainder was the property of Co-op Investment Bank. However, the records were stored in his home in January 1984 so that employees could prepare client statements for 1983. [9] The Co-op Investment Bank records fell within the summon's scope which called for the production of all evidence of indebtedness including collateral agreements between GDL or any related company. [10] Laurins concealed GDL's files after the summons was issued with the permissible inference that his intent was to frustrate the

enforcement of the IRS summons. [11] A trial judge is more than an umpire and may participate in a trial to a limited extent. A new trial is justified only if the record shows actual bias or leaves an impression that the jury perceived an appearance of bias. [12] The judge managed the trial with fairness and a concern for clarity. There was no judicial misconduct. [13] Where destruction by the government of criminal evidence is innocent, although negligent, it is insufficient for reversal unless it bears on an issue central to the case. [14] Here, there is no showing that the government intentionally destroyed his computer's hard disk storage device, and Laurins nowhere established that the disk contained exculpatory evidence. [15] Although the prosecutor injected his personal beliefs at trial and in closing argument, the harm was neutralized [16] and did not affect the fairness of Laurins' trial. [17] The corroborated, anonymous tip by the informant could be considered, along with the statements of others, to provide substantial support for the magistrate's conclusion that the warrant was supported by probable cause, under the totality-of-the-circumstances test. [18] In this case, the attorney-client privilege did not exist with respect to certain communications because they were made in furtherance of a crime or fraud. [19] The government's use of evidence that GDL had not purchased the cargo containers that were the subject of the tax shelter was admissible under Fed. R. Evid. 404(b) as proof of Laurins' motive for hiding GDL's records. [20] The consecutive sentences were proper.

COUNSEL

Brian W. Shaughnessy, Shaughnessy, Borowski & Gagner, San Francisco, California, for the defendant-appellant.

Jay R. Weill, Assistant United States Attorney, Tax Division, United States Department of Justice, San Francisco, California, for the plaintiff-appellee.

OPINION

BOOCHEVER, Circuit Judge:

Laurins appeals his conviction of obstruction of justice and aiding, abetting, and causing contempt of court, in connection with an Internal Revenue Service investigation of Gold Depository and Loan Company, Inc. He contends there was insufficient evidence to support his conviction, that he was denied a fair trial by judicial and prosecutorial misconduct, that evidence and testimony at trial were improperly admitted, and that the district court erred in imposing consecutive sentences. We affirm.

FACTS

In October 1983, the IRS selected for investigation Gold Depository and Loan Company, Inc. (GDL) for allegedly promoting and selling an abusive tax shelter. GDL was one of the Co-op Banking Group Companies, sharing offices on Union Street in San Francisco. The Companies' promotional materials listed Aleksandrs Laurins, a former IRS attorney, tax planner, and real estate developer, as managing director. The tax shelter under investigation was GDL's "Dry Cargo Marine Container Purchase Program," under which a typical investor might buy $100,000 worth of marine cargo containers with $4,000 down. GDL would arrange for financing of the unpaid balance. GDL advised the investor that he or she could then take an investment tax credit of 10% or $10,000, as well as a depreciation deduction of $15,000, on his or her tax return in the year of investment.

The IRS sent a letter to GDL in November 1983 informing it of the investigation and requesting certain documents. Attorney Bart Lee, whom Laurins had hired in January 1982 to represent both GDL and himself, requested more time to respond. No records were ever produced. On January 5, 1984, an IRS summons was served on GDL, requiring the

production for inspection and copying of all books and records for 1982 and 1983 related to the investment scheme. Lee informed the IRS that GDL was no longer doing business in San Francisco and that its only office was in Maryland, and took the position that the summons therefore was not properly served. GDL allegedly did business in San Francisco until December 31, 1983, shortly after it learned of the IRS investigation, although evidence at trial disputed that date. Laurins also claimed at trial that GDL had been sold to another company in the Co-op Banking Group, Mortgage Guaranty Trust, although he could produce no documentation of the sale.

GDL produced no documents. In April or May of 1984, Union Street employees boxed company records at Laurins' request. He then removed the boxes from the office and on several subsequent occasions produced copies of documents from the boxed records for at least one employee.

On July 12, 1984, the district court issued an order to enforce the summons, directed to Sandy Sandfort, GDL's vice president, and to GDL. A month later, GDL's purported president, Charlene Baden, met with the IRS but raised her fifth amendment privilege and again produced no records. The district court then issued an amended order requiring GDL to designate an agent to testify without invoking personal privileges against self incrimination. The agent GDL appointed, however, produced no records and could answer few questions.

The district court entered an order of contempt against GDL on June 3, 1985 for willfully failing to comply with the summons. Despite a fine of $1,000 each day no documents were produced, GDL still did not comply.

On October 3, 1986, pursuant to a search warrant, the FBI seized approximately twenty-one boxes of business records (GEX 70) from Laurins' home on Clay Street in San Fran-

cisco. The records carried the GDL name on nearly every page. On March 6, 1987, a two-count indictment charged Laurins with obstruction of justice, 18 U.S.C. § 1505 (1982), and aiding, abetting, and causing contempt of court, 18 U.S.C. §§ 2 (1982) and 401(3) (1982). After a trial in June 1987, a jury convicted Laurins on both counts. The district court imposed consecutive sentences of five years on the obstruction count and three years on the contempt count, as well as a $250,000 fine on the obstruction count.

ANALYSIS

I. Sufficient Evidence

There is sufficient evidence to support Laurins' conviction if, viewing the evidence in the light most favorable to the prosecution, any rational jury could have found the elements of the crime beyond a reasonable doubt. *United States v. Vaccaro,* 816 F.2d 443, 454 (9th Cir.), *cert. denied,* 108 S. Ct. 262 (1987).

A. Aiding, Abetting, and Causing GDL's Contempt of Court

Laurins first argues that because criminal contempt requires the willful disobedience of a court order, and GDL did not act willfully in refusing to produce documents for the IRS, his conviction for aiding, abetting, and causing must fail for lack of a principal.

[1] Title 18 U.S.C. §401(3) gives a federal court the power to punish "by fine or imprisonment, at its discretion . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Willfulness is an essential element of criminal contempt. *United States v. Armstrong,* 781 F.2d 700, 706 (9th Cir. 1986). Although willfulness is not *required* for a finding of civil contempt, civil contempt may be based on willful behavior. "The same conduct may result

in both civil and criminal contempt charges." *United States v. Rose*, 806 F.2d 931, 933 (9th Cir. 1986) (per curiam).

Whether contempt is civil or criminal depends on the intended effect of the penalty imposed. If the intent is remedial, or if the penalty is conditional in that it is meant to compel the defendant to act, the contempt is civil. If the intent is punitive and the penalty is unconditional, the contempt is criminal. *Hicks ex rel. Feiock v. Feiock*, 108 S. Ct. 1423, 1429-30 (1988).

[2] The district court in the contempt action against GDL found that GDL's failure to comply with the order enforcing summons was willful, and imposed a fine of $1,000 per day until GDL produced the records. The fine was waived if GDL complied within 30 days. This penalty clearly was intended to coerce GDL to comply as GDL could avoid the fine by prompt compliance, and was therefore a civil contempt order. *Id.*

Laurins insists, despite the language in the contempt order, that no evidence of GDL's willfulness was ever produced. Even if no such evidence existed, this is irrelevant. The indictment charged Laurins with a violation of 18 U.S.C. § 2. This "aiding and abetting" statute provides that one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2(b). This court has recently held that under section 2(b) "the government need not prove that someone other than the defendant was guilty of the substantive crime. A person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity." *United States v. Causey*, 835 F.2d 1289, 1292 (9th Cir. 1987). The intent of the person actually performing the proscribed act is immaterial in a section 2(b) prosecution. *Id.* It therefore does not matter whether at Laurins' trial GDL

was shown to have acted willfully.[1] The relevant issue was whether Laurins acted willfully in aiding, abetting, and causing the commission of contempt. It is not disputed that the jury was properly instructed on the requirement of willfulness for Laurins' conduct.

Laurins also argues that he had disassociated himself from GDL by the time the summons issued, and because he was neither GDL's agent nor its representative, and because the company itself had been sold, he had no obligation to respond to the summons and cannot be held in contempt for willful failure to comply with the court order enforcing it.

[3] It is Laurins' failure to obey the court order, not the summons itself, that is at issue in his conviction for contempt. A court order binds parties and those in active concert with parties who have actual knowledge of the order. Fed. R. Civ. P. 65(d); *United States v. Baker*, 641 F.2d 1311, 1314 (9th Cir. 1981). A nonparty may be held liable for contempt if he or she either abets or is legally identified with the named defendant. *NLRB v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977). Those not legally identified with a party but actively in concert with the party must have actual knowledge of the order to be bound. *Id.*

An order to a corporation binds those who are legally responsible for the conduct of its affairs. *NLRB v. Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir. 1984); *see United States v. Wilson*, 221 U.S. 361, 376 (1911). De facto as well as de jure officers are responsible for enabling a corporation to comply with orders directed to it. *United States v. Seetapun*, 750 F.2d 601, 607 (7th Cir. 1984).

[1]The district court, however, did instruct the jury that "you may not find the defendant guilty unless you find beyond a reasonable doubt that every element of the offense was committed by some person or persons, that the defendant participated in the commission." The jury apparently could find Laurins guilty of aiding and abetting even under the standard urged by Laurins.

[4] Although Laurins insisted that he had no legal connection with GDL after its purported sale, there was ample evidence at trial that he continued to exercise at least de facto control over the company after the summons issued. Laurins authorized Lee to represent GDL before the IRS in late 1983, and met with Lee to discuss the investigation a number of times thereafter. Bank records examined by the IRS showed that Laurins signed $4,200,000 in GDL checks from San Francisco checking accounts in January through April of 1984, and Laurins remained the only person able to sign checks on GDL accounts without a cosignor. In the fall, after the order enforcing the summons issued in July 1984, Laurins sent a Union Street employee to the corporate offices of the Co-op Investment Bank in St. Vincent, British West Indies, to create "records" of lease income from the containers, and provided him with a suitcase full of GDL documents.

[5] Even if there were no evidence of Laurins' continuing control of GDL, his concealment of the records in his home certainly constitutes abetting GDL's failure to comply. As a party in active concert with GDL who had actual knowledge of the order through Lee, his attorney, Laurins properly could be found in contempt for aiding and abetting GDL.

B. Obstructing Justice

Laurins argues that the evidence on this count was insufficient because the government failed to show (1) that the records found in his home (GEX 70) were the records called for in the IRS summons, and (2) that he had the specific intent necessary to violate the statute.

18 U.S.C. § 1505 provides in part:

> Whoever corruptly ... influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being

> had before any department or agency of the United States . . . [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.

[6] Submitting false documents in response to an IRS subpoena is a violation of section 1505. *United States v. Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976) (per curiam). Section 1505 is similar in language to 18 U.S.C. § 1503 (1982), the statute proscribing obstruction of justice in a judicial proceeding, and cases interpreting section 1503 are relevant to constructions of section 1505. *See United States v. Browning, Inc.*, 572 F.2d 720, 723, 725 (10th Cir.) (sections 1503 and 1505 prohibit similar conduct, and the meaning of "corruptly" in both statues is broad), *cert. denied*, 439 U.S. 822 (1978). The failure to provide documents is a violation of section 1503, *United States v. Lench*, 806 F.2d 1443, 1445 (9th Cir. 1986), and is similarly a crime under section 1505.

(1) Evidence that GDL Records Were Concealed in Laurins' Home

[7] Laurins claims that the only evidence that the records found in his home were those called for in the IRS summons of January 4, 1984, was testimony by a former Union Street employee. The IRS agent investigating GDL, however, also testified that the records were those requested in the summons, and consisted of investor files, many signed by Laurins.

[8] Laurins further claims that eighty to ninety percent of the "customer files" in GEX 70 consisted of material not in existence when the summons was issued, and that the remainder was the property not of GDL but of Co-op Investment Bank as trustee for the Mortgage Guaranty Trust. A former employee of one of the companies at Union Street testified, however, that GEX 70 contained GDL investor files that he had prepared beginning in January of 1984, and that in April or May of 1984 Laurins ordered him to box up the files and later removed them from the office. Laurins explained that he

had stored the cargo container records in his home, and that in January 1984 he brought those records into the office so that employees could prepare client statements for 1983. Those records were part of GEX 70. He characterized the bulk of the documents as records of the Co-op Investment Bank, supporting loans made for the cargo container program.

[9] Co-op Investment Bank, in which Laurins had an ownership interest, was another of the Co-op Banking Group companies, and according to Laurins financed the purchase of the containers. GDL's records of purchase and loans nevertheless would qualify as GDL records under the summons, which called for the production of all evidence of indebtedness including collateral agreements between GDL "or any related company" and the investors. Viewing this evidence in the light most favorable to the government, a rational jury could conclude that the files in Laurins' possession contained a substantial amount of material covered by the summons. That some of the files belonged to other corporations or were created after the summons issued is not determinative, because there was competent evidence that significant amounts of material were GDL records predating the summons.

(2) Specific Intent

[10] The specific intent required for obstruction of justice under sections 1503 and 1505 is that defendant must have acted "corruptly," *i.e.*, that the act must be done with the purpose of obstructing justice. *See United States v. Rasheed,* 663 F.2d 843, 852 (9th Cir. 1981), *cert. denied,* 454 U.S. 1157 (1982). Concealing documents falls within this definition. *Id.* Laurins testified that he intended to wait for the government to summon him personally and then assert his fifth amendment privilege. He therefore claims that he did not intend to obstruct justice. There was ample evidence at trial, however, that Laurins had concealed GDL's files after the summons

was issued, with the permissible inference that his intent was to frustrate the enforcement of the IRS summons. That part of his motive may have been to wait until he was personally summoned and then to assert a privilege does not negate the evidence of a corrupt motive. The Supreme Court recently reaffirmed that the custodian of corporate records may not claim the fifth amendment to resist a subpoena for corporate records, whether the subpoena is directed to the corporation or to the custodian. *Braswell v. United States,* 108 S. Ct. 2284, 2290 (1988); *see also Wilson,* 221 U.S. at 384-85.

Laurins also claims that the government should have served him personally as a third-party recordkeeper under 26 U.S.C. § 7609 (1982) or as a custodian under 26 U.S.C. § 7602 (1982). A third-party recordkeeper must be engaged in the making or keeping of records for the taxpayer's purpose; an attorney may be a third-party recordkeeper only if he is the taxpayer's attorney. *United States v. Joseph,* 829 F.2d 724, 729 (9th Cir. 1987). Laurins does not explain why he should be considered a third-party recordkeeper, and he does not fit any of the categories listed in section 7609(a)(3). Although Laurins testified in an October 1984 state court proceeding that he was GDL's counsel in 1983, he also testified that he had ceased to be counsel when he appointed Lee. Nor does Laurins indicate why removal and concealment of the GDL records makes him a custodian who is insulated from liability for obstruction of justice related to the GDL summons. A rational jury could find beyond a reasonable doubt that Laurins intended to obstruct justice. *See Lench,* 806 F.2d at 1446.

II. Judicial and Prosecutorial Misconduct

Laurins claims that judicial and prosecutorial misconduct denied him a fair trial. Our review of the entire trial transcript convinces us that no reversible misconduct occurred.

A. The Judge's Conduct

[11] A federal judge has broad discretion in supervising trials, and his or her behavior during trial justifies reversal only if it abuses that discretion. *United States v. Greene,* 698 F.2d 1364, 1375 (9th Cir. 1983). A trial judge is more than an umpire, and may participate in the examination of witnesses to clarify evidence, confine counsel to evidentiary rulings, ensure the orderly presentation of evidence, and prevent undue repetition. *United States v. Mostella,* 802 F.2d 358, 361 (9th Cir. 1986). A judge's participation justifies a new trial only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality. *Id.*

Laurins first complains that the judge conveyed the impression that Laurins had a duty to volunteer the records in GEX 70, citing examples of the judge's attempts to "clear up" the defense's position as to whether GEX 70 was or was not composed of GDL records. These questions by the judge appear to be entirely legitimate efforts to clarify a central issue in the case for the jury.

Laurins then assigns as error the judge's sixty interruptions of the prosecutor to "assist" him, while defense counsel received this "assistance" only sixteen times. The judge's interjections do not leave an impression that the interruptions showed partiality or helped the prosecutor at Laurins' expense. In fact, the judge frequently expressed exasperation at the prosecutor's methods, and so it is more likely that the interruptions disturbed the prosecution. *See United States v. Harris,* 501 F.2d 1, 10-11, & n.20 (9th Cir. 1974) (where interruptions of defense counsel aided prosecution, cumulative effect could have influenced jury); *United States v. Malcolm,* 475 F.2d 420, 427-28 (9th Cir. 1973) (defense counsel disturbed by court's interruptions). Laurins' further claim that the judge showed partiality by asking the prosecutor if he had established obstruction of justice fails. Upon defense coun-

sel's objection, the judge cured any harm by acknowledging the correctness of the objection and immediately excusing the jury before discussing the issue further.

Finally, Laurins' argument that the judge's refusal to hold bench conferences justifies a new trial also fails. It is within the court's discretion whether to conduct side-bar discussions, and Laurins does not show an abuse of that discretion. *United States v. Wellington*, 754 F.2d 1457, 1469 (9th Cir.) (failure to hold side-bar discussions not error), *cert. denied*, 474 U.S. 1032 (1985).

[12] The district judge also specifically instructed the jury not to assume that his questions expressed any opinion on the case. Although the defense moved for a mistrial, it made only one reference to the judge's conduct. We have reviewed the transcript. *See Harris*, 501 F.2d at 11 n.20. The judge managed the trial with fairness and a concern for clarity. We find there was no judicial misconduct.

B. The Prosecution's Conduct

A computer found at Laurins' business address and transported to the Federal Building in San Francisco suffered damage to a hard disk storage device and could not be repaired. Laurins claims the disk contained exculpatory evidence regarding GDL's sale before the summons issued, and that its destruction was reversible error.

[13] When the government has destroyed criminal evidence, a reviewing court must balance the quality of the government conduct and the degree of prejudice to the accused. *United States v. Roberts*, 779 F.2d 565, 569 (9th Cir.), *cert. denied*, 107 S. Ct. 142 (1986). The government must justify its conduct and the defense must demonstrate prejudice. *Id.* Where destruction by the government is innocent, although negligent, it is insufficient for reversal unless it bears on an issue central to the case. *See United States v. Kennedy*, 714

F.2d 968, 975-76 (9th Cir. 1983), *cert. denied,* 465 U.S. 1034 (1984).

[14] Here, there is no showing that the government intentionally destroyed the disk, and Laurins nowhere established that the disk contained exculpatory evidence. He claims the computer records would have shown the sale of GDL before the issuance of the summons. The evidence at trial was to the contrary. No contract or bill of sale was produced, and GDL's former controller testified that she never had been informed of GDL's sale. In view of the evidence of Laurins' continuing control over GDL, its purported sale to another of the Co-op Banking Group Companies, of which Laurins was managing director, was not a central issue. Laurins has failed to meet his obligation to demonstrate prejudice.

[15] Laurins also points to remarks made by the prosecutor as injecting his personal beliefs at trial and in closing argument. A prosecutor may not express his personal opinion of the defendant's guilt or the credibility of witnesses. *United States v. McKoy,* 771 F.2d 1207, 1210-11 (9th Cir. 1985). If the prosecutor behaved improperly, the issue is whether his behavior, in context, affected the jury's capacity to judge the evidence fairly, or whether it is more probable than not that his conduct materially affected the fairness of the trial. *United States v. Young,* 470 U.S. 1, 12, 20 (1985).

In his response to a defense objection to the introduction of testimony by Laurins' former attorney, Lee, the judge asked the prosecutor the basis of an earlier ruling that the attorney-client privilege would not bar Lee's testimony. In response, the prosecutor explained that the court had ruled that the attorney-client privilege was waived because Laurins had used Lee to perpetrate fraud. The judge promptly withdrew his question and instructed the jury to ignore that reply. This neutralized any harm. *See United States v. Endicott,* 803 F.2d 506, 513 (9th Cir. 1986). Further, as the judge pointed out,

the defense objection invited an explanation of the basis for the court's earlier ruling.

Laurins contends that, in closing argument, the prosecutor made statements that expressed his personal opinions about the strength of the government's case, the credibility of witnesses, and the credibility of the defendant. For example:

> [I]t is for you ladies and gentlemen of the jury to decide the credibility of the witnesses. I don't think there is any evidence that Mr. Lee has lied to you, that somehow he has, after all this, he has testified to you falsely, and the defendant of course, we would argue it's just the opposite.
>
> Also he testified that—I mentioned this before—all these little areas I think are deceptive, that he has lied to you repeatedly.
>
> * * * *
>
> It's obvious I think that after listening to all the evidence defendant has lied to you consistently throughout. His entire testimony is one big lie and falsity.
>
> I think the evidence is—I think the government has established beyond a reasonable doubt that with respect to count one that he clearly, as an agent or representative, obstructed the Internal Revenue Service investigation of Gold Depository and Loan as soon as that summons was served. . . . .

Laurins asserts that these remarks, coupled with others in the same vein,[2] are improper. He argues that the jury could

[2]The prosecutor also stated: "I think the evidence is, after you listen to the defendant, is arrogance, fraud, deceit"; "I think the evidence is clear,

have understood these statements "as an expression of [the prosecutor's] belief that the government witness . . . was telling the truth and the defendant . . . was lying." *McKoy,* 771 F.2d at 1211. In *McKoy,* this court reversed a conviction where a former prosecutor's testimony vouched for defense witnesses, because the prosecutor "has inherent credibility and influence as a spokesman for the United States," and his expressions of opinion could "distort the jury's decision on the question of the defendant's guilt or innocence." *Id.* at 1211-12.

Because the defense in *McKoy* objected to the testimony, *id.* at 1210, reversal was appropriate unless the error was harmless. *Id.* at 1212. Here, however, Laurins' counsel did not object to the prosecutor's summation. We therefore must decide whether these remarks, absent an objection, constitute plain error. *United States v. Lopez,* 803 F.2d 969, 972 (9th Cir. 1986), *cert. denied,* 107 S. Ct. 1958 (1987). Reversal is appropriate if necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process. *United States v. Bustillo,* 789 F.2d 1364, 1367 (9th Cir. 1986).

The prosecutor's remarks were not sufficiently egregious as to constitute plain error. Although the prosecutor did express an opinion that Laurins was a liar, he indicated that it is "after listening to all the evidence" that he reached that conclusion. It could have been construed by the jury as a comment on the evidence rather than an assertion of personal belief.

[16] The statements "must be viewed in context" to see whether they affected the fairness of Laurins' trial. *Young,*

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that this man will use anyone and lie to anyone to achieve his own purposes. He lies to his lawyer, evidence shows. He lies to you, he lies to the court, in order to achieve—and with no apparent remorse"; "I think his motive and his intent here to obstruct this investigation—here we have a very busy businessman controlling—I think the evidence is absolutely clear that what we have here is a puppeteer"; "I am going to skip to what I think to be just the pattern of deceit and lies that the evidence shows."

470 U.S. at 11. If the evidence was so strong that these remarks had no effect on the jury, reversal is not required. *See id.* at 19-20. The evidence at trial strongly established that Laurins had concealed the records in GEX 70 to prevent their examination by the IRS. Although the prosecutor's remarks may have bordered on impropriety, it is unlikely that the jury was improperly influenced by them, and so no plain error resulted.

III. The Admission of Evidence

A. Motion to Suppress Evidence in GEX 70

Laurins claims that the search warrant for his home, issued on the basis of an eighty-five-page affidavit, was so lacking in probable cause that GEX 70 should not have been admitted into evidence. The trial court denied Laurins' motion to suppress following an evidentiary hearing. *United States v. Laurins,* 660 F. Supp. 1579, 1581-83 (N.D. Cal. 1987). This court will review *de novo* a motion to suppress. *United States v. Andrade,* 784 F.2d 1431, 1433 (9th Cir. 1986).

In reviewing whether the warrant should have issued, this court will uphold the magistrate's decision if he or she had a substantial basis for concluding that the affidavit established probable cause. *United States v. Angulo-Lopez,* 791 F.2d 1394, 1396 (9th Cir. 1986).

Giving the appropriate deference to the issuing magistrate, we find that probable cause existed. The warrant was based in part on information from three Union Street employees of the Laurins companies, all of whom indicated that Laurins frequently would take work and records home. One employee also related that Laurins ordered file cabinets for his home, and that in phone conversations with Laurins while he was at home it was clear that GDL records were at the Clay Street address. An anonymous informant, "Phil Harris," further told the IRS that Laurins kept most of his records at home.

"Harris" knew about Laurins' businesses, and some of the events in Laurins' office.

[17] The statements by the anonymous "Phil Harris" about Laurins' business activities, problems in his office, and his tendency to work from home, were corroborated. Harris' information therefore could be considered, with the statements of others, to provide substantial support for the magistrate's conclusion that the warrant was supported by probable cause, under the totality-of-the-circumstances test set out in *Illinois v. Gates,* 462 U.S. 213, 238, 241-42 (1983).

B. Testimony of Laurins' Former Attorney

Before trial, the government filed a motion to compel the testimony of Lee, Laurins' former attorney. Following a hearing, the trial court found that the attorney-client communications related to Lee's representation of GDL during the summons enforcement proceedings. *United States v. Laurins,* 659 F. Supp. 847, 848 (N.D. Cal. 1987). Lee was also Laurins' attorney at that time. Laurins now claims that the trial judge erred in barring Lee from asserting the privilege, and that the court delved into communications still covered by the privilege.

The attorney-client privilege does not protect communications between an attorney and client which further a crime or fraud; this exception applies even where the attorney is unaware that his advice may further an illegal purpose. *United States v. Hodge & Zweig,* 548 F.2d 1347, 1354 (9th Cir. 1977). The government has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality, *id.,* and that there is some relationship between the communications and the illegality. *See In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1985). Obstruction of justice is an offense serious enough to defeat the privilege. *Id.* at 401.

[18] At trial, Lee testified that throughout the summons enforcement period, Laurins told him that the GDL records were no longer the property of GDL and were out of the country. The district court held that the attorney-client privilege did not exist with respect to those communications because they were made in furtherance of a crime or fraud. *Laurins,* 659 F. Supp. at 848. Lee resigned in December of 1986 when he learned that the records were found in Laurins' home.

Three circuits review for an abuse of discretion a district court's finding of a prima facie case that the communications were in furtherance of illegality. *In re Sealed Case,* 754 F.2d at 399-400; *In re Berkley & Co.,* 629 F.2d 548, 553 (8th Cir. 1980); *Thompson v. United States* (*In re September 1975 Grand Jury Term*), 532 F.2d 734, 737 (10th Cir. 1976). This court has stated that rulings on the scope of the privilege involve mixed questions of law and fact and are reviewable *de novo,* unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal. *United States v. Zolin,* 809 F.2d 1411, 1417 (9th Cir. 1987). Under either standard, however, Laurins' claim fails.

The judge found that the deposition testimony of Union Street employees about Laurins' boxing and removal of GDL documents was sufficient to make out a prima facie case for obstruction of justice. All the government needed to show was evidence that if believed by the jury would establish the elements of an ongoing violation. *In re Sealed Case,* 754 F.2d at 399. The evidence presented by the government met that standard. The further determination that the communications were linked with the obstruction of justice is supported by the record. Based on Laurins' representations, Lee mistakenly told the IRS that the records were no longer in San Francisco, and during the summons enforcement proceeding Lee indicated to the court that GDL no longer did business in San Francisco.

Laurins also objects to the use of notes made by Lee for a December 1983 meeting with Laurins to discuss the IRS investigation. He contends that these notes were outside the exception to the privilege and involved "legitimate defense planning by an attorney for consultation by a client concerned about alleged past wrongdoing." At that December meeting, Laurins told Lee that GDL had ceased to operate and that its records had been, or would be, sent to London. The notes thus were covered by the exception, as they related to Laurins' attempt to obstruct justice by concealing the whereabouts of GDL records.

C. Evidence of the Nonexistence of the Cargo Containers

[19] Laurins next objects to the government's use of evidence that GDL had not purchased the cargo containers that were the subject of the tax shelter. He claims the evidence was not relevant to the charges of contempt and obstruction of justice and was hearsay, and therefore should have been excluded. The government responds that the evidence was admissible under Fed. R. Evid. 404(b) as proof of Laurins' motive for hiding GDL's records.

Evidence of other crimes, wrongs, or bad acts may be introduced as proof of motive under Fed. R. Evid. 404(b), if the government establishes its relevance to an actual issue in the case. *United States v. Hodges,* 770 F.2d 1475, 1479 (9th Cir. 1985). Such evidence is not admissible, however, if its potential for unfair prejudice to the defendant substantially outweighs its probative value. *Id.*

A district court's decision to admit evidence under Rule 404(b) is reviewed for an abuse of discretion, as is its balancing of the evidence's probative value against its prejudicial harm. *United States v. Feldman,* 788 F.2d 544, 557 (9th Cir. 1986), *cert. denied,* 107 S. Ct. 955 (1987).

At trial, the government introduced evidence that GEX 70 contained no records of any purchase of containers, and

Laurins' controller from April 1983 to February 1984 testified that she never saw any documentation of purchases of cargo containers. A Union Street employee testified that in the fall of 1984, Laurins sent him to the island of St. Vincent in the British West Indies to prepare lease income statements, manufacture fake certificates of ownership, and fill out blank checks to create the appearance that containers had been purchased and leased.

This evidence is highly relevant. If the tax shelter was fraudulent, Laurins had a clear motive to disobey the court order and obstruct the IRS investigation. *See United States v. Sutton*, 732 F.2d 1483, 1493 (10th Cir. 1984) (evidence that defendant falsely certified crude oil logically tends to show motive and intent to obstruct justice), *cert. denied*, 469 U.S. 1157 (1985). As discussed above, both the contempt and the obstruction charges require willful behavior.

The government also offered testimony by the IRS agent investigating GDL that his review of Co-op Investment Bank records showed that the bank did not purchase containers. Laurins' counsel objected that the evidence was hearsay. After initially overruling the objection, the court then granted a motion to strike and instructed the jury to disregard the testimony. Any possible error was cured.

As Laurins himself argues, proof of his willfulness and his corrupt intent was necessary for his conviction. The district court did not abuse its discretion in finding that the prejudice to Laurins from the evidence of fraud did not substantially outweigh its clear relevance to Laurins' motive for concealing the records to avoid a tax investigation.

D. Authentication of GDL Records in GEX 70

Laurins' claim that the GDL records were not properly authenticated is meritless. The GDL name appears on almost every page, and the records were identified by the IRS agent

who searched the residence and by the employee who prepared the files.

IV. Consecutive Sentences

[20] Laurins was sentenced to consecutive sentences of five years for obstruction of justice and three years for aiding, abetting, and causing contempt of court. He argues that the consecutive sentences were improper as double punishment for a single act.

Separate punishment is proper if each statutory provision violated "requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Although the same conduct was the basis for the two counts, proof of contempt of court does not necessarily include proof of obstruction of justice. *See United States v. Woodward*, 469 U.S. 105, 107-08 (1985). As discussed above, 18 U.S.C. § 401(3) punishes the disobedience of a court order; 18 U.S.C. § 1505 punishes corrupt obstruction of a pending agency proceeding. Without actually disobeying a court order, an individual could obstruct an IRS investigation by hiding documents sought by the agency. It would also be possible to disobey a court order without obstructing an investigation by a department or agency of the United States, where no such investigation was pending. Nor is there any evidence in either statute that Congress did not intend to allow separate punishments. *See id.* at 108. The consecutive sentences were proper.

CONCLUSION

Laurins' conviction is AFFIRMED.

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
MAY 12 1989
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CLERK

No. 88-1545

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALEKSANDRS V. LAURINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15 pp

QUESTIONS PRESENTED

1. Whether there was sufficient evidence that petitioner acted with intent to obstruct justice and to commit contempt of court.

2. Whether the district court and the prosecutor engaged in misconduct that denied petitioner a fair trial.

3. Whether petitioner is entitled to dismissal of the charges against him because a hard disk storage device in a computer seized by the government suffered damage and could not be repaired.

4. Whether the $250,000 fine imposed on petitioner was proper.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-24a) is reported at 857 F.2d 529.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1988. A petition for rehearing was denied on January 17, 1989 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of obstructing justice, in violation of 18 U.S.C. 1505, and one count of aiding, abetting, and

causing a contempt of court, in violation of 18 U.S.C. 401(3). The district court sentenced petitioner to consecutive terms of five years' imprisonment on the obstruction of justice count and three years' imprisonment on the contempt of court count. The court also fined petitioner $250,000 on the obstruction of justice count. Pet. App. 7a. The court of appeals affirmed (*id.* at 2a-24a).

1. In October 1983, the Internal Revenue Service (IRS) began an investigation of a tax shelter program offered by Gold Depository and Loan Company, Inc. (GDL), one of a group of firms known as the Co-op Banking Group Companies (the Companies), which shared offices in San Francisco. Petitioner, a former IRS attorney, tax planner, and real estate developer, was the managing director of the Companies. Pursuant to the GDL tax shelter program, called the "Dry Cargo Marine Container Purchase Program," a typical investor might buy $100,000 worth of marine cargo containers, making a $4,000 downpayment. GDL would then arrange financing for the balance of the purchase and advise the investor that he could claim an investment tax credit of 10% of the $100,000 and a depreciation deduction of $15,000 on his tax return for the year of the investment. Pet. App. 5a.

In November 1983, the IRS sent GDL a letter informing it of the investigation and requesting certain documents. Bart Lee, an attorney whom petitioner had hired in January 1982 to represent both himself and GDL, requested additional time to respond. No records were produced in response to the IRS letter. Pet. App. 5a.

On January 5, 1984, the IRS served GDL with a summons requiring the production of all books and records for 1982 and 1983 relating to the tax shelter. Lee told the IRS that GDL was no longer doing business in San Francisco and that its only office was in Maryland. He took the position that the summons had therefore not been prop-

erly served. Petitioner also claimed at trial that GDL had been sold to another company in the Co-op Banking Group, although he could produce no documentation of such a sale. Pet. App. 5a-6a.

GDL produced no documents in response to the January 5, 1984, summons. In April or May 1984, employees at the offices that GDL had shared in San Francisco placed GDL records into boxes at petitioner's request. Petitioner then removed the boxes from the office and on several occasions produced copies of documents from the boxed records for at least one employee. Pet. App. 6a.

On July 12, 1984, the district court issued an order enforcing the summons. The order was directed to Sandy Sandfort, GDL's vice president, and to GDL. A month later, Charlene Baden, purportedly the president of GDL, met with the IRS but asserted her Fifth Amendment privilege against compulsory self-incrimination and therefore produced no records. The district court then issued an amended order requiring GDL to designate an agent to testify without asserting the privilege. GDL appointed an agent who produced no records and could answer few questions. Pet. App. 6a.

On June 3, 1985, the district court held GDL in contempt for willfully failing to comply with the summons. Although the court imposed a fine of $1,000 for each day the records were not produced, GDL still did not comply with the summons. Pet. App. 6a.

On October 3, 1986, the FBI executed a search warrant at petitioner's home in San Francisco. The agents seized approximately 21 boxes of business records. The records bore the GDL name on nearly every page. Pet. App. 6a-7a.

2. Petitioner was prosecuted for obstruction of justice and aiding and abetting GDL in a contempt of court. Fol-

lowing his conviction, the court of appeals affirmed (Pet. App. 2a-24a). The court first found that petitioner was properly convicted of aiding and abetting GDL, even if the company lacked the requisite intent to be convicted of contempt of court as a principal. The court explained that " '[a] person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity' " (*id.* at 8a (citation omitted)). The court also held that there was sufficient evidence that petitioner intended to obstruct justice, finding "ample evidence * * * that [petitioner] had concealed GDL's files after the summons was issued, with the permissible inference that his intent was to frustrate the enforcement of the IRS summons" (*id.* at 12a-13a).

Next, "review[ing] * * * the entire trial transcript" (Pet. App. 13a), the court rejected petitioner's claim of judicial and prosecutorial misconduct. The court concluded that the district court had "managed the trial with fairness and a concern for clarity" (*id.* at 15a), and that certain remarks by the prosecutor, which "may have bordered on impropriety" (*id.* at 19a), did not constitute plain error. The court also held that petitioner had suffered no prejudice as a result of damage to a hard disk storage device, which occurred when the government transported a GDL computer to the Federal Building in San Francisco. The court found "no showing that the government intentionally destroyed the disk," and it noted that petitioner had not "established that the disk contained exculpatory evidence" (*id.* at 16a). Finally, the court upheld the admission of evidence that GDL had never purchased the cargo containers that were the subject of the tax shelter. The court stated that that evidence corroborated the fraudulent nature of the tax shelter and thus explained petitioner's motive to disobey

the court order and obstruct the IRS investigation (*id.* at 22a-23a).[1]

ARGUMENT

1. Petitioner contends (Pet. 10-16) that there was insufficient evidence that he acted with the intent to obstruct justice and to commit contempt of court. He asserts that GDL could not have complied with the order to produce records and, moreover, that its failure to comply was not willful. Since, in petitioner's view, the company could not have been convicted as a principal, petitioner contends that he was improperly convicted as an aider and abettor. It is well settled, however, that under 18 U.S.C. 2 a person who causes another to commit an offense is punishable as a principal, even where the person who completes the wrongful act lacks the criminal intent or capacity required to be separately convicted. *United States* v. *Causey*, 835 F.2d 1289, 1292 (9th Cir. 1987); *United States* v. *Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1100 (11th Cir. 1983); *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, 363 F.2d 68, 72 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967). See also *United States* v. *Giles*, 300 U.S. 41, 48-49 (1937).

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[1] The court also rejected petitioner's challenge to the admissibility of the records seized from his home (Pet. App. 19a, 23a-24a) and the admissibility of testimony of his former attorney (*id.* at 20a-22a). The court likewise rejected petitioner's claim that consecutive sentences could not be imposed in this case (*id.* at 24a). The petition does not present those issues.

Petitioner also contends (Pet. 11) that he had dissociated himself from GDL by the time of the court order and that there was no evidence that he had aided and abetted the company in its contempt. That claim is meritless. A court order to a corportion binds those who are legally responsible for the conduct of its affairs, and de facto as well as de jure officers are responsible for enabling a corporation to comply with orders directed to it. *Wilson* v. *United States*, 221 U.S. 361, 376 (1911); *United States* v. *Seetapun*, 750 F.2d 601, 607 (7th Cir. 1984); *NLRB* v. *Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir. 1984). As the court of appeals explained (Pet. App. 10a), there was abundant evidence that petitioner continued to exercise at least de facto control of GDL after the issuance of the IRS summons. He authorized attorney Lee to represent GDL before the IRS in late 1983, and he met with Lee to discuss the investigation a number of times afterward. Bank records examined by the IRS showed that petitioner signed GDL checks having a total value of more than $4 million between January and April 1984, and petitioner remained the only person authorized to sign checks on GDL accounts without a co-signor. In the fall, after the order enforcing the summons was issued, petitioner sent a San Francisco employee to the corporate offices of the Co-op Investment Bank in St. Vincent, British West Indies, to create "records" of lease income from containers that were supposedly involved in the tax shelter scheme, and he provided the employee with a suitcase filled with GDL documents. Pet. App. 10a. In short, petitioner was clearly playing a role in the corporation's affairs that imposed on him a legal duty to enable GDL to comply with the district court's order enforcing the summons. Instead of complying with that obligation, he concealed producible records in his home. From that evidence, the court of appeals cor-

rectly concluded (*ibid.*) that petitioner aided and abetted GDL's failure to comply with the district court's order.

Petitioner next contends (Pet. 11-13) that there was insufficient evidence that he specifically intended to obstruct the IRS investigation of GDL. Contrary to his assertion, however, petitioner did not merely "remain silent" (Pet. 11); he actively concealed the records called for by the court order. By his own admission, petitioner secured the GDL documents with the intention to delay or prevent IRS access to them; he testified at trial that he intended to wait for the government to summon him personally and planned at that point to assert his Fifth Amendment privilege (Pet. App. 12a). In light of the refusal or inability of other GDL agents to produce records or answer questions, the jury could reasonably infer that petitioner acted as he did in order to prevent the government from learning that he was in possession of the summoned records.

Petitioner contends (Pet. 13-14), however, that he relied on this Court's decision in *United States* v. *Doe*, 465 U.S. 605 (1984), and thus believed in good faith that he was permitted to retain the summoned documents and await the opportunity to assert a Fifth Amendment claim. He further asserts that not until this Court's decision in *Braswell* v. *United States*, 108 S. Ct. 2284 (1988), was there any reason to doubt that a custodian of corporate records lacks the right to assert the Fifth Amendment. There is no basis for that claim. First, *Braswell* did not "change[] the law" (Pet. 13) in any respect; it merely applied "[t]he plain mandate of [prior] decisions * * * [that] a corporate custodian * * * may not resist a subpoena for corporate records on Fifth Amendment grounds" (108 S. Ct. at 2290). Moreover, shortly after the *Doe* case was decided, and well before the contempt order was entered in this case, the Ninth Circuit had held in *United States* v. *Malis*, 737

F.2d 1511 (1984), that the custodian of records of a collective entity is not entitled to assert the Fifth Amendment privilege to avoid producing the records. Since *Malis* referred to *Doe* (737 F.2d at 1513 n.2), it was clear in the Ninth Circuit, where petitioner committed his acts, that *Doe* had not overruled the well-established collective entity rule. See *United States* v. *Vallance*, 793 F.2d 1003, 1006 (9th Cir. 1986). In any event, even if, after *Doe*, petitioner believed that he had a right not to produce the GDL records himself, he plainly had no right to prevent the corporation from doing so and had no reason to believe that he had such a right. See, *e.g.*, *United States* v. *Lang*, 792 F.2d 1235, 1240 (4th Cir.), cert. denied, 479 U.S. 985 (1986); *United States* v. *Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986).[2]

2. Petitioner contends (Pet. 17-24) that the district court and the prosecutor engaged in misconduct that denied him a fair trial. The court of appeals "review[ed] * * * the entire trial transcript" and concluded that "no reversible misconduct occurred" (Pet. App. 13a). That fact-bound determination warrants no further review.[3]

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[2] Petitioner asserts (Pet. 15-16) that his conviction was improper because he did not appear in the civil contempt proceeding brought against GDL. However, he cites no authority requiring an individual to participate in a contempt proceeding before he may be prosecuted for preventing a corporation from complying with a court order enforcing a summons. And *United States* v. *Seetapun*, 750 F.2d 601 (7th Cir. 1984), on which petitioner relies, imposes no such requirement.

[3] Petitioner takes issue (Pet. 22-23), in passing, with the trial court's refusal to hold bench conferences in this case. He contends that the decision below, upholding the trial court's practice in this case, is in conflict with the Ninth Circuit's prior decision in *United States* v. *Wellington*, 754 F.2d 1457, 1469, cert. denied, 474 U.S. 1032 (1985). *Wellington* does not, however, require bench conferences to be held in every case and, in any event, any intra-circuit conflict on that issue does not justify review by this Court. See *Wisniewski* v. *United States*,

With respect to the prosecutor's conduct, petitioner contends that the prosecutor was permitted to express his personal beliefs to the jury. In the examples given by petitioner, however, the prosecutor did not express a personal belief in the guilt of the petitioner or of any witness's credibility. Rather, the prosecutor simply stated why he thought particular items of evidence were relevant. Moreover, the jury was instructed that its recollection of the evidence governed—and not that of the attorneys—and that statements of the attorneys were not evidence (Gov't C.A. Br. 24-26).

Petitioner further asserts (Pet. 19-21 & n.10) that it was improper for the prosecutor to present evidence that the cargo containers supposedly involved in the GDL tax shelter did not exist. The court of appeals correctly rejected that claim (Pet. App. 22a-23a), explaining that the evidence was directly relevant to the charges against petitioner. As the court of appeals noted (*id.* at 23a), the nonexistence of the cargo containers tended to prove that the tax shelter was fraudulent, and thus established petitioner's motive for disobeying the court order and obstructing the IRS investigation.

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353 U.S. 901, 902 (1957). We note that in *United States* v. *Ledesma*, 632 F.2d 670, cert. denied, 449 U.S. 998 (1980), the Seventh Circuit stated, "Although Rule 103(c) [of the Federal Rules of Evidence] does not require the court to hold all proceedings pertaining to the admissibility of evidence outside the jury's presence, * * * an automatic 'no sidebar' rule is contrary to the requirement that proceedings 'be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury . . .' " (*id.* at 674). But the Seventh Circuit held that the trial court's no-sidebar rule was not reversible error, because the practice had no more than a slight effect on the jury. Petitioner has likewise failed to demonstrate that the trial court's procedure had any impact on the verdict.

3. Petitioner asserts (Pet. 24-27) that he is entitled to dismissal of the charges against him because a hard disk storage device in a computer seized by the Government suffered damage and could not be repaired. Petitioner contends that the disk contained accounting data that would have corroborated his claim that the documents seized from his residence were not called for by the IRS summons. The court of appeals correctly rejected that claim.

The government's destruction of potentially exculpatory evidence does not violate due process unless the defendant shows that the government acted in bad faith or that the lost evidence would have been both material and favorable to the defense. *Arizona* v. *Youngblood*, 109 S. Ct. 333, 336-337 (1988). See *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867-872 (1982) (defendant failed to show that deportation of witnesses violated Fifth or Sixth Amendment where Government acted in good faith and defendant failed to show how the witnesses' testimony would have been material and favorable to his defense). Petitioner is unable to dispute the court of appeals' conclusion that "there is no showing that the government intentionally destroyed the disk" and that petitioner failed to "establish[] that the disk contained exculpatory evidence" (Pet. App. 16a).[4]

4. Petitioner finally contends (Pet. 28-29) that the $250,000 fine imposed upon him on the obstruction of justice count was improper. Recognizing (Pet. 29) that a fine in that amount was authorized for convictions of

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[4] Contrary to petitioner's suggestion (Pet. 26-27), the trial court did not give a mistaken jury instruction concerning the missing computer evidence. Fairly read, the instruction advised the jury that it could infer that the evidence would have been favorable to petitioner (see *id.* at 27).

felonies committed after December 31, 1984,[5] he contends that his offense was committed on or about July 12, 1984. We note, first, that petitioner failed to raise that argument in the court of appeals. Accordingly, he may not do so here. In any event, the indictment charged petitioner with an offense continuing from on or about January 5, 1984, through October 3, 1986 (Indictment at 1), and the evidence showed that petitioner's offense consisted not of a single act, but of a course of concealment, a continuous violation. See *Land* v. *United States*, 177 F.2d 346, 348 (4th Cir. 1949). Thus, petitioner committed his offense in part after December 31, 1984, and was subject to a $250,000 fine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

MAY 1989

[5] Such a fine was initially authorized by 18 U.S.C. 3623(a)(3) (Supp. II), enacted on October 30, 1984, and is now authorized by 18 U.S.C. 3571(b)(3), which petitioner miscites (Pet. 29) as 18 U.S.C. 3571(a)(3).

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